In the Supreme Judicial Court of Massachusetts—Law Term, Suffolk, June, 1860.

JAMES HARTSHORN, JR., ET AL., *vs.* SHOE AND LEATHER DEALERS' INSURANCE COMPANY.

1. A policy which is upon a specified kind of goods, to be brought in a certain kind of ships, within a stated time, with a rate of premium fixed, leaving nothing but the quantity and value of the goods to be declared and endorsed on the policy, as the invoices are received, is a valid, open policy, and might embrace goods that were lost and known to be lost before they were endorsed on the policy.
2. But where a policy was under-written "for whom it may concern, to be insured lost or not lost, fifteen thousand dollars on property on board vessel or vessels, steamboat or steamboats, or land carriage, at and from ports or places, to ports or places; all sums at risk under this policy to be endorsed hereupon and valued at the sum endorsed: premium, such per cent. as shall be written against each endorsement;" and certain goods were lost by a peril of the sea, while on board the steamer Palmetto, from Philadelphia to Boston, previous to the 23d of March, 1858, no application being made to the insurers until the 24th of March, 1858, to have the same endorsed on the policy, at which time it was publicly known that the steamer Palmetto was lost, and the endorsement was then refused upon the ground that the vessel was so lost, and was publicly known to be so, it was held that the insurer had never assumed the risk, and was therefore not liable to the assured, because, 1st, the policy was an insurance on property and was wholly wanting in any description of the kind of property which is to be the subject of the risk; 2d, because no ports are named from or to which it is to be transported; 3d, because there is no limitation to a particular kind of vessels, but the language extends to goods transported by steamboats, sailing vessels, and land carriage; 4th, because no time is named within which the policy is to be limited; and, 5th, because no rate of premium is ascertained and fixed by the policy.
3. Where matters material to the consummation of a contract are to be adjusted and agreed between the parties before an endorsement can be made on the policy, the risk does not attach until such adjustment is perfected.
4. What is necessary to constitute a valid open or running policy.

This was an action of contract on a Policy of Insurance, dated Feb. 11, 1858, whereby the defendants caused Hartshorn & Co., "for whom it may concern, to be insured, lost or not lost, fifteen thousand dollars on property on board vessel, or vessels, steamboat, or steamboats, or land carriage, at and from ports or places to ports

or places." "All sums at risk under this policy to be endorsed hereupon and valued at the sum endorsed." "Premium, such per cent. as shall be written against each endorsement."

The goods were lost by the peril of the sea while on board the steamer Palmetto, from Philadelphia to Boston, and previous to 23d of March, 1858. The evidence tended to prove that the plaintiffs applied, on the morning of 23d March, to have the goods by the steamer Palmetto endorsed on their policy, that the plaintiffs had, upon receiving an invoice of a part of the goods, on the day previous, and supposing that other goods were also about to be sent, told their book-keeper that goods were coming, and that it would be necessary to get an endorsement for $4,000 on the policy. The plaintiffs had not received the bills of lading before the 23d March. The book-keeper omitted, by his neglect, to make any application on that day to the defendants to have the same endorsed on the policy. But the next morning he did apply for such endorsement to be made thereon, but not until it was publicly known that the steamer was lost, although the book-keeper testified that when making the application he had not heard of the same. The endorsement was refused by the defendants, upon the ground that the vessel was lost and publicly known to be so. The defendants alleged that it was too late; they were not bound unless the endorsement was on.

The question was upon the right of the plaintiffs to recover upon this policy for a loss occurring under these circumstances. The Court held that the defendants were not liable. They further held that usage was not competent evidence to fix the rate of premium, when the evidence had an express refusal of the company to take the risk, upon a policy drawn on the present form.

The opinion of the Court was delivered by

DEWEY, J.—The contract of insurance, like other contracts, requires a legal consideration to render it valid. The insurer, for a premium to be paid by the insured, undertakes to indemnify against loss on property exposed to peril. That the insurer is not allowed to receive or retain a premium for insurance when no risk

has attached, is abundantly shown by the numerous cases where such pre-paid premium has been recovered back by the assured. It must, from the nature of the case, be equally true that the payment of a premium, or a liability to pay the same, must always exist on the part of the assured, when the insurers are responsible for a risk. In those cases, where the amount and value of goods are known, and also the mode of conveyance is arranged, the matter of premium is very easily adjusted between the parties, the same being paid either in cash, or by a note payable at a future day for the precise amount to be paid for the risk. The money or note thus taken is the absolute property of the insurer, and furnishes the consideration of the risk assumed. When the quantity of merchandise to be forwarded is not precisely known, the rate of premium is definitely fixed, and the gross sum to be paid made to depend upon the value subsequently ascertained from the invoice. The difficulty in the present case arises from the peculiar terms of this policy. It is an open or running policy, the precise property to be covered by it to be ascertained and declared after the date of the policy, and open to the objections hereinafter stated. No doubt that in reference to an open policy drawn in the form many such are, it would be competent for the assured to declare the subject to which the policy is to be applied after he had received knowledge of the loss. The validity of a general insurance, describing the articles of merchandise to be hereafter shipped on account of the assured, was sanctioned by the King's Bench in *Kinley* vs. *Ryan*, 2 Hen. Black. 343. The policy was at and from Granada to Liverpool in ship or ships warranted to sail before the 1st of August, 1793. It was said in that case by the Court that the legality of a general insurance on goods to come in ship or ships was too well established both by usage and authority to be disputed. An insurance of this character had been sustained without any apparent objection in the earlier case of *Henchman* vs. *Offey*, reported in a note to the last cited case. In the latter case the policy was on goods to come in ships from Bengal to London, which should sail between the 1st of July and 31st December, 1780. But in neither of these cases were the terms of the policy such as are found in the case before us.

That policies on goods by a ship or ships, to be thereafter declared, are valid, and that the party may be declared after a loss, seems to be assumed in Phillips In. 67. This would be a perfectly reasonable construction of such contracts as applied to goods which were directly the subject of the policy, and for which a premium had been stipulated to be paid. Take the case of a shipment of certain goods ordered by a resident of New York to be shipped from New Orleans, the character of the goods, and the mode of conveyance, and rate of premium, all declared in the policy, but the precise amount or value, on the particular ship or ships by which they were to be sent, unknown to the assured. In such case, the parties understand the insurance to cover all the goods ordered, and the premium agreed to be paid attaches to be forwarded under such order. Here is a reciprocity in the obligations assumed by the parties. The premium for the risk is paid, or agreed to be paid, and the policy attaches to the goods when the transportation commences. In such case, it may properly be held that the endorsement on the policy may be made of the goods forwarded after the knowledge of the loss has come to the assured.

But the plaintiffs particularly rely upon the case of *Carver* vs. *Manufacturers Ins. Co.*, 6 Gray 214, as decisive in their favor. To a certain extent, it certainly has an important bearing upon the present case. It sanctions contracts between assured and insurers, by which the former may in certain cases declare the application of the policy to goods lost after the knowledge of such loss has been received by him. As already previously remarked, there are contracts of insurance where the parties obviously intend this, and both parties are bound whenever the goods are shipped to treat them as insured goods, for which on the one hand the premium is to be paid, and on the other the policy is to attach.

When the policy is upon a specified kind of goods, to be brought in a certain kind of ships, within a stated time, from a certain port named, and with a rate of premium fixed, leaving nothing but the quantity and value of the goods to be declared and indorsed on the policy as invoices might be received, we see no objection to giving legal effect to it, as embracing any such goods that might be lost,

and known to be lost before they were indorsed on the policy. Such a policy would imply that all the goods of the kind amend, shipped within the time and manner stated, were to be covered by the insurance, and that, as to all such goods, a premium would be earned, and good faith would require both parties to give full effect to such a policy.

The case of *Carver* vs. *Manufacturers Insurance Company* had much of this character of certainty and definite understanding of the parties on all points material to the risk, and as to the rate of premium, leaving nothing to be done but to enter the amount of the shipment upon the policy from time to time as they should come to the knowledge of the assured. It was definite in the following particulars: 1st. The character of the property to be insured was stated in the policy—"Cotton gins and bandings." 2d. The ports from and which they were to be shipped was stated, viz: at and from New York and New Orleans. 3d. They were to be shipped by steamers. 4th. The time and duration of the policy fixed "to be closed in twelve months if not sooner filled." 5th. The rate of premium fixed in the policy, viz: "one per cent." Under such a policy, it might well be held that the parties contemplated an insurance of all the "cotton gins and bandings" of the plaintiff that might be shipped in steamers from or to the ports named, to an amount not exceeding $25,000 during the period of twelve months from the date of the policy. But the policy in the present case has not one of these five elements: 1st. It is an insurance on property and is wholly wanting in any description of the kind of property which is to be the subject of the risk. 2d. No ports are named from or to which it is to be transported. 3d. No limitation to a particular kind of vessels, but extending to goods transported by steamboats, sailing vessels, and land carriage. 4th. No time named within which the policy is to be limited. 5th. No rate of premium fixed by the policy, the premium on the same being this, "the consideration for this insurance by the assured at and after the rate of such *per cent.* as shall be written against each endorsement." The policy itself demonstrates that the endorsement required was to be an act having the concurrence and sanction of both parties, as the rate of premium in every

case of a new endorsement was to be such per cent. "as shall be written against each endorsement." The assured surely had not the right to fix the rate, nor was he obliged to make an endorsement with such a rate of premium, however high, as the insurers might demand. No rate of premium being fixed, no kind of vessels to be employed stated, no ports to or from which the goods were to be transported, the species of merchandise to be shipped entirely uncertain, all show that this was an inchoate contract of insurance as to shipments of property ordered after the date of the policy, and was to be practically a new and separate insurance on each successive parcel of goods as they were endorsed on the policy, and a rate of premium, as agreed upon, written against such endorsement. That the plaintiff so understood it, and acted upon the hypothesis that an endorsement was necessary to give effect to the policy as to new shipments, is strongly indicated by the course of the evidence introduced at the trial. One of the witnesses says, that one of the plaintiffs told him on 22d March that there were goods coming, and it would be necessary to get an endorsement on the policy. One of the plaintiffs testifies that on Monday afternoon, 22d March, he said to the book-keeper, "We have a large quantity of goods coming by the steamer; I do not know when she sails, but you must take care to have it endorsed on the policy." Suppose the goods lost by the plaintiffs, and the subject of the present action, had arrived in safety at Boston, and no endorsement of the same had ever been made on the policy, or any proposition to do so, would the plaintiff have been legally bound to pay a premium for the insurance thereof, the same as if an endorsement had been made? This would seem to be a test question as to the liability of the insured to make good the loss of the same, as in the one case there would be a consideration for the promise to do so, and in the other there would not. To make such an agreement, binding the stipulation and risk proposed, must be mutually understood by the parties. 2 Phil. Ins. 11. *Ocean Insurance Company* vs. *Carrington*, 3 Conn. 357. Here they were not, but matters material to the consummation of the contract were to be adjusted and agreed upon by the parties before an endorsement of new shipments of goods could properly be made. Without,

therefore, at all questioning the validity of a class of cases of open and running policies of a more restricted character to which reference has been made, and where the endorsement was entered upon the policy after the knowledge of the loss, we are of the opinion that the present case does not fall within them.

As to the question of the competency of the proposed evidence of usage in respect to open and running policies, that the premium is to be at the market rate, this evidence was properly rejected, first, because such usage might well exist as to the class of open policies which have been referred to as valid, being definite in their description of the goods the mode of conveyancce, the ports from and to which they were to be carried, and the time of transportation, and not effect this case. But if the inquiry was as to a usage more comprehensive it would not avail the plaintiff, as it would be inconsistent with the terms of the policy to give effect to any such usage. The provisions of this policy forbid this species of evidence. There are so many circumstances that might exist here affecting the rate of premium, that it could not well be adjusted by adopting any principle of market rate of premium. But, further, the parties here, by the terms of the policy, provide that the "premium shall be such per cent. as shall be written against the endorsement," excluding the idea of a previously agreed mode of fixing the rate, but leaving that, as we have already construed the contract to imply, to be mutually agreed by the parties before endorsing the risk.

We have found very few adjudicated cases bearing upon the points which, we think, are material in the present case. The decision of the Supreme Court of Louisiana in *Downieville* vs. *Sun Mutual Insurance Company*, 12 Louisa. An. Reports, 259, upon an open and running policy, subject to some of the objections now urged, will be found to be in accordance with the views we have taken.

Judgment for the defendants.